EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

(DS473)

THIRD PARTY SUBMISSION OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. The United States welcomes the opportunity to present its views in this proceeding on *European Union – Anti-Dumping Measures on Biodiesel from Argentina* (DS 473). In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") as relevant to certain issues in this dispute.

II. ARGENTINA'S CLAIMS REGARDING ARTICLE 2 OF THE AD AGREEMENT

A. To Determine Whether a Measure Is "As Such" Inconsistent with the AD Agreement, the Panel Should Examine Whether the Measure Necessarily Requires WTO-Inconsistent Action or Precludes WTO-Consistent Action

2. Argentina claims that the second subparagraph of Article 2(5) of the European Union's "Basic Regulation" is "as such" inconsistent with Articles 2.2 and 2.2.1.1 of the AD Agreement, and by extension Article VI:1 of GATT 1994.[1] The relevant subparagraph provides that:

> If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.[2]

3. According to Argentina, this measure "requires" the EU's investigating authorities "to adjust or establish costs" utilizing an alternative method outside of the producer or exporter's books and records where "prices of an input are 'abnormally or artificially low' because they are set in a 'regulated market' or because of the existence of some alleged 'distortion' on the domestic market."[3] Argentina indicated, however, that it "is not challenging the European Union's practice as a distinct measure."[4] As described in detail below, Argentina claims that this measure is "as such" inconsistent with the obligations found in Articles 2.2.1.1 and 2.2 of the AD Agreement.

4. The EU for its part argues that "[a] fundamental characteristic of an 'as such' challenge against a 'measure' is that the complaining party must establish that the measure is 'necessarily inconsistent' with the covered agreements."[5] The EU further agrees with the recent statement by

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[1] Argentina's First Written Submission, paras. 25-27, 87-133; *see also* Argentina's First Written Submission, paras. 134-146 (describing the "as such" inconsistency with Articles 2.2 of the AD Agreement and Article VI:1(b)(ii)), as well as Article 18.4 of the AD Agreement, and Article XVI:4 of the WTO Agreement); European Union's (EU) First Written Submission, paras. 63-208.

[2] "Basic Regulation," Article 2(5).

[3] Argentina's First Written Submission, para. 86.

[4] Argentina's Response to the EU's Preliminary Ruling Request (hereinafter, Argentina's Ruling Request Response), para. 71; *see also* EU's First Written Submission, para. 117.

[5] EU's First Written Submission, para. 184 (*citing US –Oil Country Tubular Goods Sunset Reviews* (AB), at 172; *US – Shrimp II (Viet Nam)*, para. 7.32).

the Appellate Body that an "as such" claim will succeed if "the text of the measure on its face…identif[ies] elements requiring an investigating authority to engage in conduct inconsistent with [the covered agreements]."[6] Thus, there would appear to be no disagreement between the parties that a measure may be found "as such" WTO-inconsistent if it "requires" inconsistent action – that is, if it mandates such conduct.

5. The United States agrees that a complainant may allege that another Member's legislation or regulation is inconsistent with a covered agreement "as such" or "independently from the application of that legislation in specific instances."[7] To prove an "as such" claim, the complainant must demonstrate that the identified measure requires the responding party to act in a WTO-inconsistent manner or precludes that party from acting in a WTO consistent manner.[8] That is, where a Member may apply a measure in a WTO-consistent manner, there is no basis for the WTO to find that the Member has through that measure *already* breached its WTO obligations because of the potential for a *future* WTO-inconsistent application. Of course, once a Member chooses to apply the measure, that application (for example, the imposition of an antidumping duty) may itself be challenged. But any breach in the latter case would stem from the Member's *decision* in that specific case on how to apply the underlying measure, and not from the underlying measure itself.

6. In this context, the EU emphasizes the express *discretion* of the investigating authorities under Article 2(5) of the Basic Regulation to adjust costs.[9] In particular, the European Union observes that: (i) text of paragraph one of Article 2(5) *does not require* that investigating authorities depart from producers' cost data,[10] and (ii) the "rest of the evidence" (*e.g.*, judgments of the General Court of the European Union, and determinations in other investigations) does not demonstrate that the investigating authorities are *mandated* to act in a particular manner.[11] As a result, the European Union argues that Argentina has failed to establish a *prima facie* case that the second paragraph of Article 2(5) of the Basic Regulation is "as such" inconsistent with Article 2.2.1.1.[12]

7. The United States considers the Appellate Body's recent analysis in *US – Carbon Steel (India)* informative. As described by the Appellate Body report in *US – Carbon Steel (India)*, the complaining party bears the "burden of introducing evidence as to the scope and meaning of such law to substantiate [its] assertion."[13] The Appellate Body subsequently reviewed whether the text of the measure "reveals its discretionary nature," or identifies "elements requiring an investigating authority to engage in conduct inconsistent with" the relevant WTO agreement.[14]

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[6] EU's First Written Submission, para. 185.

[7] *US – 1916 Act* (AB), para. 60.

[8] *See e.g*, *Korea – Commercial Vessels*, para. 7.63 (noting that the Appellate Body continues to use the mandatory/discretionary distinction); *China – Raw Materials* (Panel), paras. 7.776, 7.783, 7.786, 7.796; *EC – IT Products* (Panel), paras. 7.113-7.115; *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* (AB), para. 121; *US – Carbon Steel (India)* (AB), para. 4.483.

[9] EU's First Written Submission, paras. 119-126.

[10] EU's First Written Submission, para. 119 (describing the "broad discretion" provided "to the authorities to determine whether the records of a particular company 'reasonably reflect costs'").

[11] EU's First Written Submission, paras. 120-124.

[12] EU's First Written Submission, para. 126.

[13] *US – Carbon Steel (India)* (AB), para. 4.450 (*quoting US – Carbon Steel* (Panel), para. 157).

[14] *US – Carbon Steel (India)* (AB), para. 4.483.

In that dispute, the Appellate Body also reviewed additional evidence, including judicial decisions, legislative history, and quantitative and qualitative materials on the application of the measure,[15] and considered whether the investigating authorities were "subject to rules and disciplines separate from the measure itself."[16] The Appellate Body ultimately concluded that these materials did not "establish conclusively that the measure requires an investigating authority to consistently" act contrary to the relevant WTO obligation.[17]

8. In this dispute, the United States refrains from commenting on whether the facts substantiate each party's assertions whether the measure "requires" certain action or provides "discretion" to the EU's investigating authority to take different action. The United States supports the use of the analysis applied in *Carbon Steel* and other reports, in that the Panel should examine the meaning of the EU measure (as established under EU municipal law, for example, through the plain meaning of the text and any additional evidence), to determine whether Argentina has demonstrated that Article 2(5) of the Basic Regulation "requires" that the EU act in a WTO-inconsistent manner.

B. The Panel's Analysis of Article 2.2.1.1 of the AD Agreement Should Be Informed by the Text and Context of the AD Agreement

9. Both Argentina's "as such" and "as applied" claims are dependent of the interpretation and meaning of Article 2.2.1.1 of the AD Agreement. To that end, Argentina argues that Article 2.2.1.1 of the AD Agreement "does not allow investigating authorities to reject or adjust costs of certain inputs . . . because the prices of these inputs are considered to be abnormally or artificially low in comparison to other markets."[18] Rather, Argentina asserts that the utilized costs must be "the expenses actually incurred by the producer."[19] Conversely, the EU argues that under Article 2.2.1.1 the costs utilized in the construction of normal value need not be the "expenses actually incurred by the producer," where those costs are not "reasonable."[20] As explained below, the United States considers that Article 2.2.1.1 requires an investigating authority to "normally" rely on producers' or exporters' books and records, but, as permitted by the text of the provision, the authority may look beyond these records in limited circumstances.

1. Investigating Authorities Shall Normally Calculate Costs on the Basis of Records Kept by Exporters When the Costs are in Accordance with Generally Accepted Accounting Principles (GAAP) and Reasonably Reflect Cost

10. As a preliminary matter, the United States considers that Article 2.2.1.1 requires an investigating authority to normally calculate costs on the basis of records kept by an exporter's or producer's books, provided that (i) the books and records are in accordance with the GAAP of the exporting country, and (ii) reasonably reflect the costs associated with the production and

[15] *US – Carbon Steel (India)* (AB), para. 4.483; *see also id*., para. 4.477.
[16] *US – Carbon Steel (India)* (AB), para. 4.476.
[17] *US – Carbon Steel (India)* (AB), para. 4.483.
[18] Argentina's First Written Submission, para. 132.
[19] Argentina's First Written Submission, para. 216.
[20] EU's First Written Submission, para. 234 (*citing* Argentina's First Written Submission, para. 216), *see also id*., paras. 130-145.

sale of the product under consideration.[21] This view was adopted by panel in *China – Broiler Products*, which found:

> Although Article 2.2.1.1 sets up a presumption that the books and records of the respondent shall normally be used to calculate the cost of production for constructing normal value, the investigating authority retains the right to decline to use such books if it determines that they are either (i) inconsistent with GAAP or, (ii) do not reasonably reflect the costs associated with the production and sale of the product under consideration. However, when making such a determination to derogate from the norm, the investigating authority must set forth its reasons for doing so.[22]

11. Therefore, in situations where books and records are kept in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration, the investigating authority is normally obligated to use those records pursuant to Article 2.2.1.1.

12. The qualification to the obligation in Article 2.2.1.1 is reinforced by the use of the term "normally," which is defined as "in the usual way" or "as a rule."[23] Thus, the term "normally" in conjunction with the two conditions ("provided that") in Article 2.2.1.1 indicates that use of a producer's or exporter's books or records is not necessary in every case and the investigating authority has the ability to consider other available evidence in limited instances. To that end (and contrary to Argentina's position),[24] if the investigating authority finds that the books and records do not meet the stated conditions, the authority is "bound to explain why it departed from the norm and declined to use a respondent's books and records."[25]

2. Article 2.2.1.1 and the Meaning of "Costs"

13. With respect to the interpretation of the second condition, "reasonably reflect the costs associated with the production and sale of the product under consideration," the parties attribute a number of differing meanings to these terms. As a preliminary matter, Argentina asserts that the Article 2.2.1.1 reference to "costs" rather than to "prices" indicates "unambiguously" that it "refers to the expense actually incurred by the producers"[26] "even if such costs reflect prices

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[21] *US – Softwood Lumber V* (Panel), para. 7.237; *China – Broiler Products* (Panel), para. 7.161.

[22] *China – Broiler Products* (Panel), para. 7.164

[23] *See China – Broiler Products* (Panel), para. 7.161; *see also* CONCISE OXFORD DICTIONARY, p. 975 (2009); *see also US – Clove Cigarettes* (AB), para. 273 ("We observe that the ordinary meaning of the term 'normally' is defined as 'under normal or ordinary conditions; as a rule'.)

[24] Argentina's First Written Submission, para. 216.

[25] *China – Broiler Products* (Panel), para. 7.161.

[26] Argentina supports this point by relying on the English, Spanish, and French dictionary definitions of "costs." *See* Argentina's First Written Submission, para. 101. Specifically, "Costos," the Spanish equivalent, refers to the "cantidad que se da o se paga por algo," (*id*., para 101 (*citing* Diccionario de La Lengua Española, Real Academia Española, 22a Edición, 2001 (Exhibit ARG-25))), and "Frais," the French equivalent, refers to "dépenses occasionnées par une opération quelconque, dépenses se rapportant à des opérations spécifiques" (*id*., para 101 (*citing* Le Petit Robert, Dictionnaire de la Langue Française, 2001, p. 449 and Le Petit Larousse Illustré, 2000, p. 1982 (Exhibit ARG-26))). Both definitions simply indicate that the term refers to the amount paid in exchange for something. Neither, however, carries the additional meaning imputed by Argentina that "costs" must reflect the amounts actually incurred by exporters or producers.

which are lower than prices in other markets."[27] This conclusion does not follow from the ordinary meaning of "costs," the textual context of both Article 2.2.1.1 or the remainder of Article 2, or the panel reports that have interpreted this language.

14. In particular, Argentina fails to explain how the use of "costs" over an analogous term, like "prices," implies that "costs" must then refer exclusively to the "charges or expenses that have been actually incurred by producer."[28] Moreover, the panel in *EC – Salmon (Norway)* did not find any meaningful distinction between "costs" and "prices" when it defined "cost of production" as the "price to be paid for the act of producing."[29] Therefore, Argentina's assumption that the use of the term "costs" necessarily implies costs "actually incurred by the producer" is not borne out by the ordinary meaning of "costs." In the context of Article 2, the United States considers the difference between "cost" and "price" to be a matter of perspective, and not one of substance.[30]

15. Additionally, Argentina's argument that "costs" relates only to expenses "actually" incurred by producers is undermined by adjacent text in Article 2. The drafters of the AD Agreement chose to utilize an express limitation – to amounts actually incurred by the producer elsewhere in Article 2. For instance, for administrative, selling, and general costs, Article 2.2.2(i) references "the actual amounts incurred and realized by the exporter or producer in question." This construction limits the investigating authority to using the "actual" value incurred by the respondent "in question." Article 2.2.2(ii) repeats this express limitation to "the actual amounts incurred and realized by other exporters or producers." Given the express language utilized in Article 2.2.2(i) and Article 2.2.2(ii), a more natural reading of Article 2.2.1.1 is not to limit "costs" to those actually incurred in the way envisioned by Argentina.

16. Further, Articles 2.2.2(i) and 2.2.2(ii) both pertain to the determination of "general costs." According to Argentina, the term "costs" is inherently specific to expenses "actually incurred by the producer."[31] Argentina's interpretation would therefore render superfluous the "actually incurred and realized" by the "exporter or producer" language utilized in Articles 2.2.2(i) and 2.2.2(ii). An interpretation that reduces entire phrases to redundancy or inutility is not to be favored.[32]

17. For these reasons, the United States does not consider the use of the term "costs" in the context of Article 2.2.1.1 to be indicative of a limitation with respect to the "actual amount incurred" as reflected by the producer's own books and records.

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[27] Argentina's First Written Submission, para. 102.

[28] *See* Argentina's First Written Submission, para. 101; *see also id.*, paras. 102-103.

[29] *EC – Salmon (Norway)* (Panel), 7.481.

[30] For instance, in the context of a producer's books and records, the appropriate term may be cost, whereas elsewhere the term price may be utilized.

[31] Argentina's First Written Submission, para. 216.

[32] *See e.g.*, *US – Gasoline* (AB), p. 23; *Australia – Apples* (Panel), para. 7.214; *Indonesia – Autos* (Panel), paras. 14.39-14.40.

3. Article 2.2.1.1 and the Meaning of "Reasonably" in Relation to "Costs"

18. In its First Written Submission, Argentina argues that because "reasonably" immediately precedes "reflect," it cannot be read to modify the "costs" referenced later in the sentence.[33] As a result, in Argentina's view, Article 2.2.1.1 requires the use of an exporter's or producer's records whenever that exporter or producer transposes, within reason, its actual expenses to its records.[34] Argentina's argument is contrary to the ordinary meaning of Article 2.2.1.1. In particular, the word "costs" is used twice in the first sentence of Article 2.2.1. 1, and the "reasonably reflect" language links the "costs" used for determining normal value with the "costs" associated with the production and sale of the product. More specifically, the plain language provides that the "costs" used for the calculating normal value shall "normally" be based on the exporter's or producer's records, but that the costs need not be used if they do not reasonably reflect the costs associated with the production and sale of the product under consideration. The panel report in *Egypt – Rebar* supports this interpretation, stating that a panel must evaluate whether "there was evidence in the record that the short-term interest income was *'reasonably' related to the cost of producing and selling.*"[35]

19. Argentina's argument also would seem to render redundant the first and second conditions in Article 2.2.1.1. Specifically, the first condition of Article 2.2.1.1 stipulates that investigating authorities "normally" calculate costs on the basis of GAAP-compliant producer records. This first condition therefore permits costs to be rejected based on books and records not in accordance with GAAP. However, under Argentina's interpretation, the second condition would establish yet another requirement that producer records faithfully reflect the costs incurred by producers. Although GAAP may serve as an indicia that costs are reasonable, since accounting principles typically ensure costs are properly sourced and recorded, this may not in all instances be sufficient. Argentina's interpretation must therefore fail because it presumes two overlapping and identical conditions. As described in *China – Broiler Parts*, the "very existence of the second criterion – reasonable reflection of cost of production and sale – in Article 2.2.1.1 is an acknowledgement that there is more to determining whether to use the books and records of the exporters than whether the books are appropriate for accounting purposes."[36]

20. Further, the United States does not understand Article 2.2.1.1 to solely refer to "cost allocation" issues. Argentina argues that because the second and third sentences of 2.2.1.1 refer to cost allocation, cost allocation must be the object of "reasonably reflect the costs associated with the production and sale of the product under consideration."[37] However, Argentina overlooks the explicit reference in the first sentence of Article 2.2.1.1 to costs "calculated," rather than "allocated." That "allocated" is explicitly mentioned elsewhere in the text, but not in the first sentence of 2.2.1.1, contradicts Argentina's argument.

21. When read together with other terms in Article 2.2.1.1 – and in particular "reflect the costs associated with" – the term "reasonably" can be understood to establish a substantive

[33] Argentina's First Written Submission, para. 107.
[34] Argentina's First Written Submission, para. 104.
[35] *Egypt – Rebar* (Panel), para. 7.393 (emphasis added)
[36] *China – Broiler Parts* (Panel), para. 7.166.
[37] Argentina's First Written Submission, para. 111.

reasonableness standard for the costs reflected in the producer's or exporter's records. That is, Article 2.2.1.1 does not require investigating authorities to rely on the costs reflected in a producer's books or records if the evidence establishes that those costs are unreasonable because those records would then not reasonably reflect the costs associated with the production and sale of the product.

22. The United States notes that the language of Article 2.2.1.1 leaves open what costs may be "unreasonable" – such that the records do not reasonably reflect the costs associated with the production and sale of the product. The panel reports in *China – Broiler Parts*[38] and *US – Softwood Lumber V*[39] do not provide further guidance on this issue. In particular, while Argentina cites *US – Softwood Lumber V* for the proposition that Article 2.2.1.1 does not allow investigating authorities to consider whether costs reasonably reflect the market value,[40] a closer reading of this panel report reveals that the panel simply opined on the investigating authority's obligation.[41] In particular, the panel found that Article 2.2.1.1 did not *obligate* the investigating authority to reject unreasonable costs,[42] or to use producer cost data, as reflected in their books and records, if demonstrated to be unreasonable.[43] In fact, the panel noted that "Article 2.2.1.1 does not require that any particular methodology be used by an investigating authority to assess whether records 'reasonably reflect the costs associated with the production and sale of the product under consideration.'"[44]

23. As demonstrated by *US - Softwood Lumber V*, it is clear that, on an individual respondent-basis, adjustments are permitted to account for "unreasonable" costs, the recordation of which nonetheless comply with GAAP.[45] For instance, inputs purchased from a related or affiliated supplier may not reasonably reflect a respondent's costs. Accordingly, investigating authorities often require responding exporters or producers to demonstrate that purchases of inputs were made at "arms-length." Where such purchases are not shown to be made at "arms-length," the investigate authority may require an adjustment to the cost as recorded in the exporter or producer's books and records.[46] This adjustment – to ensure that the data reasonably reflect the costs associated with production or sale of the product – is typically based on record evidence including sales to the first non-affiliated party, costs incurred by other exporters or producers, or other evidence of the appropriate costs.

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[38] *China – Broiler Parts* (Panel), para. 7.172.

[39] *US – Softwood Lumber V* (Panel), para. 7.318 ("noting that Article 2.2.1.1 does not require that any particular methodology be used by an investigating authority to assess whether records 'reasonably reflect the costs associated with the production and sale of the product under consideration'").

[40] Argentina's First Written Submission, para. 128.

[41] *See also US – Softwood Lumber V* (Panel), para. 7.321 (where complainant asserted that the respondent's books provided costs in excess of the market value and therefore should have been adjusted downward, the panel considered whether the investigating authority was required to stray from costs as recorded).

[42] *US – Softwood Lumber* V, para. 7.237 ("Article 2.2.1.1 does not in our view require that costs be calculated in accordance with GAAP nor that they reasonably reflect the costs associated with the production and sale of the product under consideration.")

[43] *US – Softwood Lumber V* (Panel), para. 7.318.

[44] *US – Softwood Lumber V* (Panel), para. 7.318.

[45] *US – Softwood Lumber V* (Panel), paras. 7.327-7.348 (describing the rejection of certain cost data on the basis of transactions with affiliates).

[46] *See US – Softwood Lumber V* (Panel), para. 7.327-7.328; *see also* Judith Czako, et al., *A Handbook on Anti-Dumping Investigations* (World Trade Organization, 2003), at 154, n. 82.

24. The United States further notes that the context provided by the language of Article 2.2 supports the understanding that market conditions may lead to records reflecting "unreasonable" costs. In fact, Article 2.2 of the AD Agreement is especially pertinent context for Article 2.2.1.1, because Article 2.2.1.1 elaborates on the basic rules set out in Article 2.2 for the determination of normal value. Article 2.2 provides that where there exists a "low volume of the sales in the domestic market of the exporting country" or a "particular market situation," sales in the domestic market do not permit a proper comparison. The text of Article 2.2 therefore contemplates circumstances where some peculiarity, structure, distortion, or other occurrence of the domestic market makes a direct comparison to home market prices impossible. Reading Article 2.2.1.1 in light of this context, Article 2.2.1.1 allows for investigating authorities to ensure that the calculation of a constructed normal value takes account of a government tax scheme (such as that adopted by Argentina) that may render recorded costs unreasonable.

25. In sum, the United States does not interpret Article 2.2.1.1 to allow investigating authorities to deviate from producer cost records arbitrarily or for a cause other than those enumerated in Article 2.2.1.1. On the other hand, the United States does understand Article 2.2.1.1 to permit investigating authorities to consider whether a particular cost is unreasonable, and whether it may be adjusted, so long as the investigating authority sufficiently explains its determination.

4. Article 2.2.1.1 and the Meaning of "Associated with the Production and Sale of the Product Under Consideration"

26. Finally, it is revealing that, rather than modify "reasonably reflects costs" with the phrases "actually incurred" or "by the exporter or producer in question," Article 2.2.1.1 references costs "*associated with* the production and sale of the product under consideration." The Article 2.2.1.1 language is not directly tied to the producers or their books and records. Rather, the term "associated with" suggests a more general connection between the relevant costs and the production or sale of the product. As noted above in relation to the term "costs," the use of the term "associated with" also conveys a conception of costs more general than just those borne by the specific respondent.

27. Prior panel reports support this view. For instance in *Egypt – Rebar*, the panel described the analysis of "costs associated with the production and sale of the product under consideration" as "hing[ing] on whether a particular cost element does or does not pertain, in that investigation, to the production and sale of the product in question *in that case*."[47] The panel noted that it must therefore "consider the details of the evidence of record in order to reach a conclusion as to whether, in the rebar investigation, there was evidence in the record that the short-term interest income was 'reasonably' related to the cost of producing and selling rebar, and that the IA thus should have included it in the cost of production calculation."[48] Similarly, for this dispute, the

[47] *Egypt-Rebar* (Panel), para. 7.393 (emphasis original).

[48] *Egypt-Rebar* (Panel), para. 7.393; *see also id*., para. 7.422 ("We recall that to resolve this claim, we must consider whether the evidence of record indicates that the short-term interest income is related to the production and sale of rebar in the Turkish home market.")

question posed by this phrase is whether the cost of soybeans and soybean oil is a "cost associated with the production and sale" of biodiesel.[49]

28. For these reasons, the United States considers Article 2.2.1.1 of the AD Agreement to normally require an investigating authority to calculate a company's costs based on its books and records when those books and records are consistent with GAAP and reasonably reflect the costs associated with the production of the product under consideration. To the extent that a cost reflected in those books and records does not reasonably relate to the production and sale of the product under consideration, an investigating authority need not use that cost in its calculations under Article 2.

29. The second condition of the first sentence of Article 2.2.1.1 is not simply a reformulation of the requirement that records be GAAP compliant. Specifically, the United States understands that Article 2.2.1.1 does not require the use of a particular respondent's records where the costs documented in those records are determined to be "unreasonable" or otherwise unrelated to the production of the product under review. While the United States takes no position on the facts underlying this dispute, it does consider there to be a range of reasons related to individual respondents, as well as larger market conditions, which may render particular costs to be unreasonable. Pursuant to Article 2 of the AD Agreement and with adequate explanation regarding its departure from the exporter or producer's records, an investigating authority may address that cost when determining a reasonable normal value.

C. Article 2.4 of the AD Agreement Addresses Issues of Price Comparability and Not the Proper Determination of Normal Value

30. Argentina argues that the EU did not establish the existence of a margin of dumping for the respondents on the basis of a fair comparison between the export price and the normal value. In particular, Argentina states that the inconsistency is due to the comparison of "a constructed normal value that included an average of the reference FOB price of soybeans (minus fobbing costs) with . . . an export price that incorporated the domestic price of soybeans."[50] That is, Argentina objects to the EU's decision to disregard the domestic cost of soybeans for the purposes of calculating the cost of production, but included the domestic cost of soybeans in the export price.

31. Argentina's claim under Article 2.4 is intended to address the "clear difference between normal value and export price."[51] The United States considers the issue of the calculation of a proper normal value a matter for claims under Article 2.2.1.1, while issues related to the comparison between normal value and export prices should be considered under Article 2.4.

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[49] *See also EC-Salmon (Norway)* (Panel), para. 7.483 ("the test for determining whether a cost can be used in the calculation of 'cost of production' is whether it is 'associated with the production and sale' of the like product.")

[50] Argentina's First Written Submission, para. 296. According to Argentina, this is comparing a normal value that includes export taxes on soybeans (because the difference between the domestic cost of soybeans, and the cost of FOB soybeans utilized in this case is approximately the export tax) with an export price that excludes such taxes. *See id*., para. 289.

[51] Argentina's First Written Submission, para. 298.

32. Article 2.4 provides:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

33. It is clear that Article 2.4 obligates an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. However, the text of Article 2.4 presupposes that the appropriate normal value has been identified. Once normal value and export price have been established, the investigating authority is required to select the proper sales for comparison (sales at the same level of trade and as nearly as possible the same time), and make appropriate adjustments to those sales (due allowances for differences which affect price comparability).[52] In this way, the AD Agreement establishes a fair comparison.

34. The United States in this context agrees in principle with both complainant and respondent, that the use of constructed normal value does not preclude the need for due allowances or adjustments where necessary.[53] However, in the context of the comparison required by Article 2.4, the United States submits that the Panel should consider: first, whether there is a relevant difference between the constructed value and the export value, and second, whether such a difference has an effect on "price comparability."

III. CONCLUSION

35. As noted, the United States believes that the proper interpretation of the provisions of the AD Agreement discussed above has important systemic implications. In particular, the provisions of the related to the acceptance of books and records, as well as the sources of evidence for a particular calculation, are essential to ensuring that the anti-dumping measures are applied appropriately.

[52] For instance, Article 2.4 articulates that to ensure a fair comparison between export price and normal value, due allowance shall be made with respect to models with differing physical characteristics, at distinct levels of trade, pursuant to different terms and conditions, and/or in varying quantities, all of which may affect price. *See EC –Tube or Pipe Fittings* (Panel), para. 7.157. The panel in *Egypt – Steel Rebar* explained, "[A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value." (para. 7.335).

[53] *Egypt – Rebar* (Panel), para. 7.352 ("Article 2.4 . . . explicitly require[es] a fact-based, case-by-case analysis of differences that affect price comparability."); *see also US – Hot-Rolled Steel Products* (AB), paras. 166-173 (describing the effect of utilizing downstream sales to construct normal value on the need to consider price comparability).